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SUPREME COURT, U. S. No. 461

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

FRIEDA SUFFIN,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S BRIEF IN RESPONSE TO THE SOLICITOR GENERAL

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22 Cass Press Inc., 421 Hudson St., N.Y.—OXford 5-4340

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1. Contrary to the Solicitor General's assertion (Br. 6), nothing in the relevant circumstances of this case is "unique". The ICC's 1966 decision (328 ICC 884) approved the issuance of the N&W debentures pursuant to § 20a. It made the required finding that the transaction was "compatible with the public interest" (p. 893); but it made no finding of "just and reasonable"; and it made no reference to § 5(2).* The case thus squarely presents the question whether a § 20a order precludes the stockholders of a carrier from suing its fiduciaries for breach of their duty in connection with the transaction. The broad importance

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* The difference between the "public interest" standard and the "just and reasonable" standard is recognized in *Schwabacher* v. *U.S.*, 334 U.S. 182, 198-9 (1948):

> "Apart from meeting the test of the public interest, the merger terms, as to stockholders, must be found to be just and reasonable."

of this question of statutory interpretation does not require elaboration.

2. The Solicitor General in effect recognizes (Br. 5 fn.) that *New York Central Sec. Corp.* v. *U. S.*, 287 U.S. 12, 28-29 (1932), sustains the stockholders' right of action; but he maintains that the case has been overruled by *Schwabacher* v. *U.S.*, 334 U.S. 182 (1948). In fact, however, this Court's opinion in *Schwabacher* did not mention *New York Central,* although that case was cited in the briefs (see 92 L. Ed. at 1307) and in the dissenting opinion (334 U.S. at 209). The inference is strong that the *Schwabacher* Court saw no conflict between its decision and *New York Central.*

In any event, we submit, the vitality or demise of *New York Central* needs clarification by this Court, not only in the interest of the present case, but for the future guidance of the Commission (which should be told the scope of its review under § 20a), of the lower courts, and of all aggrieved carrier shareholders, who ought to know whether to seek relief against wrongdoing fiduciaries in a three judge court (with direct review by this Court) or by plenary action—or, for that matter, whether the fiduciaries enjoy complete immunity.

3. The Solicitor General misreads the record in essential respects.

(a) He states that the debenture issue "was an essential element in the merger approved in the Section 5 proceeding" (Br. 3-4; see also 1-2). Actually the ICC's merger decision of 1964 (324 ICC 1) did not so much as mention the issuance of debentures. That idea was not born until later (Pet. 3) and was not submitted to the ICC until 1966, long after consummation of the merger. The debenture transaction was thus approved under § 20a, not under § 5.

(b) The Solicitor General also errs in stating (Br. 2) that the ICC "fully examined and evaluated the terms of the debenture transaction". Apart from a reference to the market prices of the N&W stock (328 ICC at 888), the ICC gave no consideration whatever to the economic impact of the convertibility of the debentures.

(c) The Solicitor General quotes (Br. 3) the ICC as holding that the debenture exchange was "in the best interest of the applicant and its security holders". Actually, however, the quoted language (328 ICC at 891), read in context, merely expressed the Commission's view that it was desirable for N&W to buy its own shares from Pennsylvania in order to keep them from being thrown on the market; it had nothing to do with the fairness of the convertible debentures to be issued in exchange for the stock.

4. The Solicitor General contends (Br. 4-5) that, despite the separation in time of the 1964 and 1966 proceedings, the *Schwabacher* doctrine applied to the § 20a order of 1966. The contention is unfounded.

Schwabacher deals with mergers and other acquisitions under § 5; it is in that context that the ICC must determine "whether each class of stockholder receives an equivalent of what it turns in", and must "see that minority interests are protected" (334 U.S. at 201). The 1966 proceedings involved no merger or acquisition but, on the contrary, a step in the corporate divorce of N&W from Pennsylvania; hence, there was no room for the application either of § 5 or of the *Schwabacher* rule. See *County of Marin* v. *U.S.*, 356 U.S. 412 (1958), which the Solicitor General ignores. Indeed, even if the two proceedings had occurred at the same time, we seriously doubt that the accident of simul-

taneity would have operated to extend merger principles to a transaction which essentially was the opposite of a merger.

5. According to the Solicitor General (Br. 5), petitioner should have raised her objections in the § 20a proceedings before the ICC. This would have been rather difficult since —still according to the Solicitor General (Br. 5-6)—petitioner was not entitled to notice of the proceedings. In fact, as we have shown (Pet. 14-18), petitioner did not receive any notice worth that name.

The Solicitor General refers to petitioner's concession that the § 5 notice provisions are adequate and do not violate due process; he asserts that petitioner would have been entitled to no more notice than was given if the § 5 and § 20a proceedings had been held concurrently (Br. 6). The argument overlooks that, in § 5 proceedings, the ICC must "afford reasonable opportunity for interested parties to be heard"; § 5(2)(b). An opportunity to be heard would be meaningless without effective notice; *Mullane* v. *Central Hanover B. & T. Co.*, 339 U.S. 306, 314-5 (1950). Since the N&W debentures were convertible into common stock, the threatened dilution of the common would have given petitioner standing as an "interested party" under § 5(2)(b); *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 159-160 (1957). Consequently, had the proceeding been under § 5, petitioner would have been entitled to notice.

§ 20a, in contrast to § 5, contains no provision for the hearing of interested parties or for notice to them. Under constitutional due process, the rights of interested parties cannot be cut off without notice and hearing; *Mullane, supra.* The omission of any notice provision from § 20a is, there-

fore, compelling evidence that a § 20a order does not deprive aggrieved shareholders of their common law rights against wrongdoing fiduciaries.

Dated: January 10, 1969.

Respectfully submitted,

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